

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
Petition of Bell Atlantic Telephone Companies )  
for Forbearance from Regulation as Dominant )  
Carriers in Delaware; Maryland; Massachusetts; )  
New Hampshire; New Jersey; New York; )  
Pennsylvania; Rhode Island; Washington, D.C.; )  
Vermont and Virginia )

CC Docket No. 99-24

To: The Commission

**OPPOSITION OF  
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION/  
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION**

The Competitive Telecommunications Association/America's Carriers

Telecommunication Association ("CompTel/ACTA"),<sup>1</sup> by its attorneys, hereby opposes the petition of the Bell Atlantic Telephone Companies ("Bell Atlantic") for forbearance from dominant carrier regulation for special access services.<sup>2</sup> By its petition, Bell Atlantic requests forbearance from the Commission's Part 69 rate structure rules and Part 61 rate level rules as they apply to its provision of special access services in Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York (including the Greenwich, Connecticut service area), Pennsylvania, Rhode Island, Washington, D.C., Vermont and Virginia. Bell Atlantic also

<sup>1</sup> CompTel/ACTA is the principal national industry association representing competitive telecommunications carriers and their suppliers. CompTel/ACTA's over 315 plus members include large nationwide companies as well as scores of smaller regional carriers.

<sup>2</sup> *Pleading Cycle, Petition of Bell Atlantic Telephone Companies for Forbearance from Regulation as a Dominant carrier in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, D.C.; Vermont and Virginia*, CC Docket No. 99-24 (Rel. January 21, 1999).

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requests forbearance from the Commission's tariff filing rules, so as to permit it to file tariffs for special access service on one day's notice, without cost support or other supporting documentation.

In enacting the Telecommunications Act of 1996 (the "1996 Act"), Congress sought to remove the barriers to entry in the local telecommunications markets and enable unlimited opportunities for effective competition in those markets. Despite the pro-competition mandate of the 1996 Act and the Commission's continuing efforts to prescribe regulations consistent with those goals, the incumbent local exchange carriers ("ILECs") have resisted and undermined these efforts at every turn, and, as a result, competition has not yet materialized in the local services market. Nonetheless, ILECs from U S West to SBC, and now Bell Atlantic, have flooded the Commission with requests for forbearance from dominant carrier regulation on the basis that the high-capacity market is fully competitive. As in the other proceedings, the record in this proceeding demonstrates that Bell Atlantic continues to monopolize the facilities-based market segment in each of the 12 states for which forbearance is requested. As a result, the statutory criteria for forbearance are not met in the existing market for special access services and the Commission must deny Bell Atlantic's petition.

**I. BELL ATLANTIC FAILS TO DEMONSTRATE THAT FORBEARANCE IS REQUIRED UNDER SECTION 10 OF THE 1996 ACT**

The three-part test set forth by Congress in Section 10 of the 1996 Act requires the Commission to premise forbearance on a finding that enforcement of a statute or regulation is no longer necessary to guard against discriminatory behavior, protect consumers and further the

public interest.<sup>3</sup> Specifically, pursuant to Section 10(a) of the 1996 Act, the Commission may grant Bell Atlantic's request for forbearance from dominant carrier regulations only upon a finding that:

- (1) enforcement of dominant carrier regulations is not necessary to ensure that Bell Atlantic's charges and practices are just, reasonable and nondiscriminatory;
- (2) enforcement of dominant carrier regulations is not necessary to protect consumers; and
- (3) forbearance from enforcing dominant carrier requirements is consistent with the public interest.<sup>4</sup>

In addition, in determining whether forbearance is in the public interest under subsection (3), the Commission must consider whether forbearance will promote competitive market conditions and otherwise enhance competition among carriers in the Bell Atlantic territories.

Bell Atlantic has failed to demonstrate compliance with any of the required criteria. The petition itself shows that Bell Atlantic maintains monopoly control over the facilities used to provide basic local services and special access services. As a result, Bell Atlantic has both the incentive and the opportunity to engage in cross-subsidization and other discriminatory behavior to the detriment of competition and consumers. For those reasons, Bell Atlantic has not satisfied the statutory criteria for forbearance and its petition must be rejected.

## **II. BELL ATLANTIC CONTINUES TO ENJOY MARKET POWER IN EACH OF THE TWELVE STATEWIDE MARKETS FOR WHICH FORBEARANCE IS REQUESTED**

As Bell Atlantic aptly states in its petition, in order to grant its request for forbearance, the Commission must find that Bell Atlantic lacks market power in each of the 12

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<sup>3</sup> See 47 U.S.C. §§ 160(a)-(b).

<sup>4</sup> *Id.* at 160(a)(1)-(3).

states for which forbearance from dominant carrier regulation is requested.<sup>5</sup> Market power exists when a carrier has the ability to raise prices by restricting output of its services,<sup>6</sup> or when a carrier has sufficient control over the underlying facilities to enable it to discriminate against competing retail providers.<sup>7</sup> When a carrier has market power, particularly when it has a high market share and controls bottleneck facilities, the Commission has consistently imposed dominant carrier regulations.

Bell Atlantic claims that it has lost market power despite the fact that, by its own admission, it still controls at least 70% of the high capacity special access services market.<sup>8</sup> In the past, the Commission has reclassified carriers as non-dominant only under limited circumstances.<sup>9</sup> In no instance has the Commission found a carrier to lack market power where it has a facilities-based market share as high as 70%, especially where, as in the case of Bell Atlantic, the carrier controls bottleneck facilities. In a previous case involving high-capacity services, the Commission found a carrier with similar market share to be a dominant carrier. In that case, the Commission classified a foreign-affiliated U.S. carrier as dominant based upon the Commission's view that its foreign parent possessed market power over international private

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<sup>5</sup> See *Bell Atlantic Petition at 5*.

<sup>6</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd. 15756 ¶ 28 (1997).

<sup>7</sup> See *ntta.com, inc.; Application for Authority under Section 214 of the Communications Act of 1934, as Amended, to Resell Non-Interconnected Private Line Services between the United States and Japan*, 1998 Lexis 313 at ¶ 6 (January 26, 1998). In addition to market share, the Commission's market power analysis focuses on: (1) supply elasticity of the market; (2) demand elasticity of the customers; and (3) the carrier's cost structure, size and resources.

<sup>8</sup> See *Bell Atlantic Petition at 7*.

<sup>9</sup> Although Bell Atlantic asserts that its petition for forbearance is not a request for reclassification, in this instance, grant of Bell Atlantic's request for forbearance is the functional equivalent of reclassification as non-dominant since the regulations at issue apply only to dominant carriers. See *id.* at 3, fn. 3.

lines (“IPLs”). Even though the foreign parent did not control bottleneck local exchange facilities, the Commission found the parent to have market power due, in part, to its estimated 75% share of the IPL market based on revenue (60% when measured by capacity), which the Commission found to be “relatively high.”<sup>10</sup> Here, where Bell Atlantic controls approximately 70% of the facilities-based special access market in conjunction with its control over bottleneck local exchange facilities in its territory, there is no reasonable basis for exempting Bell Atlantic from dominant carrier regulation in that market segment.

Recognizing the weakness in its argument, Bell Atlantic attempts to argue that waiver of the Commission’s access and tariffing rules is warranted because it has lost up to 50% of the market in certain business districts. CompTel/ACTA submits that this argument fails for two reasons. First, despite a marginal decline in overall market share, Bell Atlantic retains monopoly control over facilities used to provide special access services. Control of high-capacity facilities, not urban market share, is the most telling indicator of market power, particularly given Bell Atlantic’s continuing control over the broader local exchange bottleneck throughout its region. Indeed, if Bell Atlantic is correct that the special access market is characterized by high demand elasticity, then it could easily increase its retail market share significantly in a relatively short period of time through relatively modest pricing and marketing adjustments.<sup>11</sup> The Commission should not rely primarily upon market share data that are subject admittedly to such volatility when assessing an incumbent LEC’s market power. So long

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<sup>10</sup> *KDD America, Inc.; Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Resell Non-Interconnected Private Line Services between the United States and Various International Points*, 11 FCC Rcd 11329, ¶12 (1996).

<sup>11</sup> *See Bell Atlantic Petition* at 9. Likewise, Bell Atlantic’s claim that its markets for special access services is subject to high supply elasticity is overstated. Many Bell Atlantic wholesale customers are subject to long-term agreements and high termination penalties.  
(continued...)

as Bell Atlantic presently has market power over local exchange facilities, it would be premature to exempt Bell Atlantic from rate regulation for special access services provided over those facilities.

Second, to the extent the Commission views market share as an indicator of market power, Bell Atlantic fails to substantiate its alleged market loss with clear and incontrovertible evidence. As the Commission has recognized in the past, requests for forbearance must be supported with more than broad, unsupported allegations.<sup>12</sup> Bell Atlantic's primary basis for asserting that it has lost market power is a report entitled *Demonstration of Competition* purporting to illustrate that competitors have a significant market share and that most of Bell Atlantic's special access demand may be reached by competitors through existing facilities or collocation. The report, however, does not provide any supporting data, or attempt to explain its methodology. Without such information, the Commission must presume that Bell Atlantic continues to dominate the market for special access services and, thus, must deny Bell Atlantic's petition until it provides real data to demonstrate otherwise.

### **III. THE POTENTIAL FOR MARKET EXPANSION IN THE BELL ATLANTIC TERRITORIES IS YET ANOTHER EXAMPLE OF BELL ATLANTIC'S MARKET POWER**

Bell Atlantic concedes that, from a geographic perspective, many of its special access services are not yet subject to competition from competitive local exchange carriers

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(...continued)

Thus, even if customers wanted to switch carriers it would be prohibitively costly to do so.

<sup>12</sup> *In the Matters of Hyperion Telecommunications, Inc., Petition To Request Forbearance, Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, Memorandum* (continued...)

("CLECs").<sup>13</sup> Yet, Bell Atlantic is seeking deregulation today throughout its service territories in 12 states, not just those areas where it claims to face competition from alternative networks. Plainly, Bell Atlantic's current 70% market share indicates that the CLECs' facilities-based inroads into Bell Atlantic's special access monopoly are still quite modest. Thus, a request for non-dominant treatment is not only premature at this time, it is overbroad in light of the sporadic geographic penetration captured by competing CLECs. The Commission must deny Bell Atlantic's request for forbearance from dominant carrier regulation until each of the twelve markets at issue is fully competitive on a geographic and service basis.

Bell Atlantic claims that through use of their own facilities or collocation agreements, competitors already can reach between 82 and 100% of the Bell Atlantic special access demand covered by its petition.<sup>14</sup> Moreover, Bell Atlantic alleges that competitors can expand existing facilities to reach a customer site within 2000 feet of its network for as low as \$6,200 in a major city or urban area or can reach a building within one mile of its network in a rural or suburban area for \$24,000.<sup>15</sup> CompTel/ACTA submits that Bell Atlantic's arguments about the existing availability of competitor facilities and the "low" costs associated with additional build-out are mere speculation. The truth is that Bell Atlantic does not have sufficient information to forecast accurately the feasibility or cost of the CLECs' build-out of alternative facilities. In fact, the McDermott and Taylor Affidavit appended to the application acknowledges that many factors affecting the cost of network expansion are beyond Bell

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(...continued)

*Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd. 8596, 8607 (1997).*

<sup>13</sup> See *Bell Atlantic Petition* at 6.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.*, Affidavit of Michael R. McCollough, at 8.

Atlantic's ability to predict or control, including site conditions, structure and equipment costs, and receipt of the requisite permits and franchises.<sup>16</sup> In addition, quick build-out depends upon cooperation from Bell Atlantic to obtain collocation, unbundled network elements and other forms of interconnection -- which Bell Atlantic has stubbornly refused to provide in the past.

As CompTel/ACTA has stated in past proceedings, the Commission should adopt a "show-me" approach and deny Bell Atlantic's petition until it can show actual (as opposed to theoretical) facilities-based competition in order to justify waiver of dominant carrier regulations.<sup>17</sup> Indeed, the premature deregulation of Bell Atlantic could provide a disincentive for CLECs to build-out their networks in the Bell Atlantic states. Simply put, if Bell Atlantic is willing and able to charge below-cost rates for deregulated special access services, the CLECs currently operating in the Bell Atlantic states may be reluctant to make the necessary capital investment because they can obtain better returns by investing that capital in other markets where expansion is needed just as urgently. As a result, customers will be less likely to benefit from the selection of carriers and lower prices that arise from competition should the Commission grant Bell Atlantic's request for forbearance.

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<sup>16</sup> *Id.*, Affidavit of Ken McDermott and William E. Taylor, at 14-15.

<sup>17</sup> See *Opposition of Competitive Telecommunications Association, In the Matter of the Petition of Bell Atlantic Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs*, CC Docket No. 98-277 at 7 (filed Jan. 21, 1999); *Opposition of Competitive Telecommunications Association, In the Matter of the Petition of Bell Atlantic Communications for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 at 7 (filed Oct. 7, 1998).



#### **IV. WAIVER OF DOMINANT CARRIER REGULATION WOULD ENABLE BELL ATLANTIC TO CROSS-SUBSIDIZE HIGH CAPACITY SERVICES**

##### **A. Bell Atlantic Would Engage In Harmful Cross-Subsidies**

Bell Atlantic completely ignores the issue of cross-subsidization in its request for forbearance. Despite Bell Atlantic's unwillingness to address cross-subsidization, it is a serious concern. The underlying network that Bell Atlantic uses to provide its high capacity services is the exact same network that it uses to provide monopolistic local exchange and exchange access services. Control over such facilities provides Bell Atlantic with both the opportunity and incentive to engage in harmful cross subsidies.

In particular, Bell Atlantic concedes that competitive alternatives largely exist only in certain business centers.<sup>18</sup> Thus, there are significant geographic portions where facilities-based CLEC competition does not now exist. Bell Atlantic could increase its rates for special access capacity and other local services in those portions of its territories in order to subsidize special access services in areas served by facilities-based CLECS. Such cross-subsidies would undermine competitive conditions in the market for high capacity services, resulting in higher prices and fewer choices for consumers.

##### **B. Bell Atlantic Could Use This Opportunity to Circumvent Section 251(c) of the 1996 Act**

Forbearance from dominant regulation also would give Bell Atlantic an additional incentive not to comply with Section 251(c) of the 1996 Act. The Commission already has rejected Bell Atlantic's Section 271 petition to provide interLATA services in New York on the basis that Bell Atlantic has not yet opened its local monopoly to competition. Deregulating

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<sup>18</sup> See *Bell Atlantic Petition* at 7.

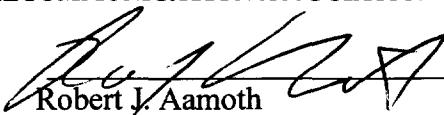
Bell Atlantic's special access services in almost all of its service territories would only give Bell Atlantic another reason to avoid complying with the market-opening provisions in the 1996 Act. If granting the petition would enable Bell Atlantic to tap its existing market power over local services to subsidize special access services, then it would fight even harder to retain that local market power against competitive inroads by new entrants as contemplated by Section 251(c). The Commission should not be giving Bell Atlantic an additional incentive to avoid complying with its statutory obligations. Forbearance from dominant regulation would in no way enhance competition and would only provide an additional mechanism for Bell Atlantic to thwart competition in the local services market.

## V. CONCLUSION

For the reasons stated herein, CompTel/ACTA submits that the Commission should deny Bell Atlantic's petition for forbearance from regulation as a dominant carrier in each of the 12 Bell Atlantic markets requested.

Respectfully submitted,

**COMPETITIVE TELECOMMUNICATIONS  
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Dated: March 18, 1999

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that on this 18th day of March, 1999, I caused true and correct copies of the foregoing **OPPOSITION OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION/AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION** to be served via hand delivery, upon those persons listed below.

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